FILED
OCT 7 1988
JOSEPH E. SPANIOL, JR.
CLERK

No. 88-484

IN THE

Supreme Court of the United States

October Term, 1988

STATE OF CONNECTICUT, *et al.*,

Petitioners,

against

DONNELL COUNSEL,

Respondent.

Brief of the Attorneys General of the States of New York, Wisconsin and Florida, *Amici Curiae*, Urging That the Petition for a Writ of Certiorari be Granted

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Dated: October 7, 1988

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Interest of the State of New York.

The Education For All Handicapped Children Act of 1975, Public Law 94-142, 89 Stat 773, (the EHA) provides federal grants to assist State and local agencies in educating handicapped children 20 USC § 1411(a)(1). Funding is contingent upon State compliance with mandated goals and procedures, the eligibility requirements. 20 USC § 1412. States "desiring to participate in the program"

must file a State plan, approved by the United States Commissioner of Education, which sets forth in detail the goals, programs and timetables as well as the State's specific procedures for the provision of a free appropriate education to all handicapped children within its borders. 20 USC §§ 1412, 1413. New York has adopted such a State plan. At the time that it did so, the EHA did not contain any provision for the award of attorney's fees. *See Smith v. Robinson,* 468 US 992 (1984). The congressional response to that case was the "Handicapped Children's Protection Act of 1986", Public Law 99-372, 100 Stat 796, approved August 5, 1986, which generally provides for the award of EHA attorney's fees. Section 5, in attempting to override *Robinson,* provided that:

> "Sec. 5. The amendment made by section 2 shall apply with respect to actions or proceedings brought under section 615(e) of the Education of the Handicapped Act after July 3, 1984, and actions or proceedings brought prior to July 4, 1984, under such section which were pending on July 4, 1984." 100 Stat 798.

A New York court has applied the EHA attorney's fees provisions retroactively in two cases in which unappealed final judgments, without costs, were issued February 6, 1986, six months before the approval of Public Law 99-372. They are *Matter of Esther C. v. Ambach,* 135 New York Misc 2d 997, 515 NYS2d 997 (Sup Ct Albany County 1987); *Matter of Sidney K. v. Ambach,* ____ Misc 2d ____, unreported (Sup Ct Albany County 1987). Appeals are pending in both cases before the New York Supreme Court, Appellate Division, Third Judicial Department. New York has a community of interest with the State of Connecticut because it is urging in State court that:

"Section 5 of Public Law 99-372 is an unconstitutional exercise of the Congress' spending power."

Reasons for granting the writ.

The judgment of the Court of Appeals should be reviewed because that court erred in holding that the retroactive application of the EHA attorney's fee award provision to closed cases is valid under (A) the spending power, and (B) the enforcement powers set out in section 5 of the Fourteenth Amendment (849 F2d 731).

A.

Upon signing the 1986 legislation, President Reagan noted his "serious reservations" as to its retroactive application to cases that were no longer pending. Such application, he stated, disturbs "settled expectations" and concepts of "traditional finality". Nor could he discern a rational basis for imposing fees in cases, like those in Connecticut and New York, already settled or finally adjudicated. However, he signed the measure "notwithstanding the constitutional problems it presents" (22 Weekly Compilation of Presidential Documents 1050, August 11, 1986, reprinted at 1986 US Code Cong & Admin News, Vol 4, p 1811). We support Connecticut because we do not believe that Congress could constitutionally impose that obligation in cases such as *Counsel* and those arising in New York in which final consent decrees or final judgments were rendered prior to August, 1986.

The thrust of the EHA is "to provide financial assistance to the States for improved educational services for handicapped children" (Senate Report No. 94-168, 94th

Cong, 1st Sess, reprinted at 1975 US Code Cong & Admin News, Vol 2, p 1425). It has been held to be an exercise of Congress' spending power (Article I, § 8, cl 1 of the Constitution). *Hendrick Hudson Bd. of Ed. v. Rowley,* 458 US 176 at 190, n 11, 204, n 26 (1982). In *Pennhurst State School v. Halderman,* 451 US 1 (1980), the Court articulated definitive, substantive criteria governing decision in spending power cases. They require that a statute which unilaterally attempts to change Congress' bargain with participating States by imposing unnegotiated conditions upon them, as does the EHA attorney's fee provision, be held to be unconstitutional. In *Pennhurst* the Court concluded that Congress may fix the terms on which it will disburse federal moneys to the states, and

> "[u]nlike legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' * * * There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. * * * By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." 451 US at 17 (footnote and citations omitted).

The Court put the test as "whether Congress spoke so clearly that we can fairly say that the state could make an informed choice. *Id.* at 25.

It is thus evident that, under *Pennhurst,* the appropriate inquiry is whether the EHA, as enacted in 1975, gave notice to Connecticut and New York that they were required to pay EHA attorney's fees as a condition to receiving federal monies. The obvious answer is that there was no such condition. *Smith v. Robinson, supra,* 468 US 992.[1]

The *Counsel* court, however, has attempted to pigeon-hole the case by holding that it "simply requires a clear indication of congressional intent to impose [retroactive] conditions". It concluded that since Congress had "specified expressly its intent that this condition should apply retroactively", *Pennhurst* was not a bar. 849 F2d 731 at 736. This Court's *Pennhurst* holding, we urge, has more substance than the Court of Appeals appears willing to have ascribed to it. That fact was acknowledged by that court in citing *South Dakota v. Dole,* ____ US ____, 107 S Ct 2793, 2796 (1987) as:

> "(reading *Pennhurst* as articulating one of 'several general restrictions' on Congress' spending power: that 'if Congress desires to condition the States' receipt of federal funds,' it must do so unambiguously)" (p 736).

Thus we urge that the retroactive imposition of attorney's fees for closed cases imposes an obligation that the States were not bound to accept if they elected not to participate in the Federal program. *See,* also, *Bennett v. New Jersey,* 470 US 632 (1985). The Congress cannot validly change its bargain with participating States unilaterally by imposing such a new and unexpected condition upon

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[1]While several lower courts have rejected this position (*see Counsel v. Dow,* 849 F2d at 736, n 3), we urge that those cases were wrongly decided.

them. *Pennhurst State School v. Halderman, supra; see also, Bell v. New Jersey,* 461 US 773, 790 n 17 (1983).

B.

The *Counsel* court buttressed its decision by holding that Congress had also acted pursuant to its Fourteenth Amendment enforcement powers. 849 F2d at 737. This Court, however, has not held that Congress did so. While, as observed below, the Court has stated that the EHA confers an enforceable right to public education, it has carefully noted that such a right exists in participating States. *Honig v. Doe,* US , 108 S Ct 592, 597 (1988).[2]

In *Pennhurst* the Court also discussed "the appropriate test" for determining when Congress intends to enforce Fourteenth Amendment guarantees. It stated that its holdings had "involved statutes which simply prohibited certain kinds of state conduct" (451 US at 16) and that the EHA, like the Developmentally Disabled Assistance and Bill of Rights Act, at issue in that case, was one of "several laws designed to improve the way in which this Nation treats the mentally retarded" (p 31). It rejected claims that Congress intended, in 42 USC § 6010, to create enforceable rights and obligations either under its Fourteenth Amendment enforcement powers or as mandatory requirements, as a condition for receiving federal monies, under its spending power (451 US at 17, 18). The Court concluded that "nothing suggests that Congress in-

[2]Several courts have held that Congress acted pursuant to its powers to enforce the Fourteenth Amendment. These include *Capello v. Dist. of Col. Bd. of Educ.*, 669 F Supp 14 (DDC 1987); *Tonya K. v. Chicago Bd. of Ed.*, not reported in F Supp, 1987 WL 14699 (ND Ill), *affd* 847 F2d 1243 (7th Cir 1988); *Yaris v. Special School Dist.*, 661 F Supp 996 (ED Mo 1987); *Laura I. v. Clausen*, 676 F Supp 717 (MD La 1988); *also Gary A. v. New Trier High School Dist.*, 796 F2d 940 (7th Cir 1986). We urge that those case were wronqly decided.

tended the Act to be something other than a typical funding statute" (p 22) and it rejected "scattered bits of legislative history" (p 20) including "the general discussion of equal protection guarantees in the Senate Report" (*idem*). Plainly, Congress had not acted pursuant to section 5 of the Fourteenth Amendment because it was not intended to place duties on the States independent of their participation in the Act. That is precisely the case here. The EHA does not place any affirmative duties upon nonparticipating states. Nor does it prohibit any kind of State conduct. Rather it encourages the States to act.

The EHA, like other grant programs, is based upon principles of "cooperative federalism". *See,* e.g., *David v. Dartmouth School District,* 775 F2d 411, 419 (7th Cir 1985), *cert denied,* 475 US 1140 (1986); *Town of Burlington v. Dept. of Educ.,* 736 F2d 773, 783-784 (1st Cir 1984), *affd,* 471 US 359 (1985). *Compare Pennhurst State School v. Halderman, supra,* 451 US at 22. The imposition of attorney's fees upon closed cases undermines that cooperative federalism concept. *Compare Conn. Dept. of Income Maint. v. Heckler,* 471 US 524, 532 n 22 (1985). Section 5 of Public Law 99-372, as applied to Connecticut and to New York, is an unconstitutional exercise of the spending power.

CONCLUSION.

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: Albany, New York
October 7, 1988

Respectfully submitted,

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